

RICHARD J GLASER,

Plaintiff,

DECISION

v.

Case No. 01 CV 1892

WISCONSIN DEPARTMENT OF COMMERCE,

Defendant.

This is a Chapter 227 appeal of a Department of Commerce (DOC) decision DOC denied Richard J. Glaser's claim for reimbursement from the Wisconsin Petroleum Cleanup Fund (PECFA) for certain contamination clean up costs. PECFA is a state program administered by DOC which grants reimbursement to property owners who clean up contamination from certain petroleum products storage tank spills and leakages.

Three issues are raised in this appeal. Glaser seeks to 1) recover disallowed lab costs, 2) recover for two occurrences instead of one, and 3) recover costs not timely submitted in a required pre-remediation cost estimate. The court affirms DOC's position with respect to the first two issues, but remands with directions for further consideration with respect to the third issue.

Review by this court is limited to the record made before the Administrative Law Judge. Wis. Stat. §227.57(1). With respect to factual issues, the ALJ's findings are to be upheld if substantial evidence was admitted to support the findings, *City of Oak Creek v. DNR*, 185 Wis. 2d 424, 444 (Ct. App. 1994). The application of law to the facts is for this court to review, giving deference to DOC in its areas of special experience or expertise. The issues of this appeal do not, however, involve any legal issues of a unique or technical nature to this program. Accordingly the court reviews the application of law de novo and without any deference, *See Dept. of Transp. v. Wis. Personnel Comm.*, 176 Wis. 2d 731, 735 (1993).

Lab Costs

Wis. Admin. Code Sec. ILHR 47.33(1)(b)1 requires that laboratory analysis done as part of the clean up must be competitively bid, Glaser's consultant reviewed price lists and did choose the lowest listed cost for the work, but no "bids" were taken DOC's denial of reimbursement of this cost is supported by the record and the law and is affirmed.

Number of Occurrences

Glaser's spill involved leakage from two separate petroleum products storage tanks. The tanks were located close to each other and the resulting leakage had contaminated one continuous merged area of soil by the time of discovery. Glaser credibly claims that the two leakages probably started at very different times. Glaser accordingly argues that he is entitled to a separate claim on each of two occurrences. This would result in a possible claim of \$100,000 on each occurrence, for a total of \$200,000. But Wis. Stat. §101.143(1)(cs) clearly defines "occurrence" as "a contiguous contaminated area resulting from one or more petroleum products discharges." DOC's interpretation limiting this claim to one occurrence, and therefore a single \$100,000 claim limit, is legally correct. The number of sources of contamination is irrelevant. It is the number of separate contaminated areas that determines the number of occurrences.

Failure to File a Cost Estimate

Wis. Admin. Code Sec. ILHR 47.33(2) requires that cost estimates be submitted to DOC before remediation activities proceed. Glaser did not comply with this requirement for certain activities, which resulted in DOC refusing reimbursement for those activities. Glaser argues that the presubmission of the estimates was meaningless and that the expenses were otherwise properly compensable. Though it does not dispute that the expenses at issue are otherwise proper, DOC sufficiently established the purpose for the pre-remediation filing requirement. Even without the record before the ALJ, common sense supports the proposition that grant applicants may reasonably be required to submit their expenditure plan in advance. Glaser also argues that the Department of Natural Resources approved the remediation activities, which is true but irrelevant to the issue at hand. There is no legal requirement that the DOC fund any or all remediation activity required or approved by the DNR.

The final and most troublesome issue relates to Wis. Stat. §101.143(2m) which provides as follows:

INTERDEPARTMENTAL COORDINATION. Whenever the department of commerce receives a notification under sub. (3)(a)3. or the department of natural resources receives a notification of a petroleum product discharge under s. 292.11, the department receiving the notification shall contact the other department and shall schedule a meeting of the owner or operator or person owning a home oil tank system and representatives of both departments. (emphasis added).

DOC concedes that this requirement did apply, but that DOC did not comply with it. The statute does not expressly establish any consequence for noncompliance.

Glaser contends that such a coordinating meeting would have alerted him and his consultant of the need to file the required pre-remediation estimates. Glaser notes that the DNR approved the "interim remedial action before commencement. It is agreed by all that the timely filing of this simple cost estimate paper would have entitled Glaser to the reimbursement he seeks.

DOC replies that this statutory provision should be construed as directory and not mandatory. *See In re the Paternity of S.A.*, 165 Wis. 2d 530, 535-36 (Ct. App. 1991). While it is true that the use of the word "shall" can be directory if the context of the statute requires that, there is no basis for such a construction in this instance. The word "shall" is used twice to require notice and a meeting. There is no impractical, absurd, unjust, or unreasonable impact of requiring such a coordinating meeting. It seems self-evidently reasonable to require such coordination to avoid inconsistency between state departments and to provide assistance and fairness to persons with leaking oil storage tanks. I conclude that the statute imposes a mandatory obligation on DOC.

The thornier issue is the impact of DOC's statutory violation on this case. DOC contends that the usual role that one is bound to know the law applies in this case. Since Glaser was bound to know the rule requiring timely submission, the lack of the required meeting is irrelevant, says DOC. Allowing DOC to ignore the legislature's express statutory directive with impunity, however, is offensive to this court's sense of the law. This is especially so as the court obtained the impression from these proceedings that DOC routinely ignores this legislative mandate.

Pursuant to Wis. Stat. § 227 57(4) the court finds that "the fairness of the proceedings" and "the correctness of the action has been impaired by a material error in procedure or failure to follow prescribed procedure." "Further, pursuant to Wis. Stat § 227 57(5) the court finds that DOC has "erroneously interpreted" the law. In accordance with Wis. Stat. § 227 57(9) directing the provision of appropriate relief, this court directs the ALJ, on remand, to conduct a fact finding hearing to determine if it is likely that DOC compliance with Wis. Stat. § 101.143(2m) would have avoided the paper work shortcoming by Glaser. If it would not have, then Glaser is to be denied relief. If compliance with the statute would more probably than not have avoided the filing shortcoming, than DOC shall pay Glaser the disputed reimbursement relating to this issue.

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Dated March 20, 2002

By the Court,

J Mac Davis, Circuit Judge, Branch 7

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